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## Lake v. Arnold: The Disabled and the Confused Jurisprudence of 42 U.S.C. § 1985(3)

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## NOTES

### LAKE v. ARNOLD: THE DISABLED AND THE CONFUSED JURISPRUDENCE OF 42 U.S.C. § 1985(3)

In 1871, as the Ku Klux Klan terrorized the Reconstruction South, the Forty-Second Congress responded by enacting the Ku Klux Klan Act.<sup>1</sup> One of the many pieces of civil rights legislation enacted by the Reconstruction-era Congresses<sup>2</sup> was section two of the Ku Klux Klan Act which sought to curb the Klan's activities in the South.<sup>3</sup> The Act created a federal civil cause of action against individuals who conspire to deprive any person, or class of persons, "equal protection of the laws" or "equal privileges and immunities under the laws."<sup>4</sup> Shortly after enact-

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1. Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985(3) (1994)).

2. Such legislation includes: Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (prohibiting Southern Black Codes); Act of May 31, 1870, ch. 14, 16 Stat. 140 (securing voting rights); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (securing voting rights); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (the Ku Klux Klan Act); Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (prohibiting racial discrimination in public accommodations). See Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 MINN. L. REV. 635, 635 n.2 (1980) [hereinafter *Class-Based Animus*].

3. See CONG. GLOBE, 42d Cong., 1st Sess., 317 (remarks of Rep. Shellabarger); see also Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952) (when this Comment was originally published, § 1985(3) was codified at 8 U.S.C. § 47(3) (1946) and 42 U.S.C. § 1983 was codified at 8 U.S.C. § 43 (1946)); Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 530-31 (1985); Janis L. McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 477 (1987).

4. 42 U.S.C. § 1985(3) (1994). Section two of the Ku Klux Klan Act provides in relevant part:

If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any

ment, section two of the Ku Klux Klan Act was essentially rendered moot by a series of Supreme Court decisions<sup>5</sup> that attempted to limit the effectiveness of all Reconstruction civil rights legislation, including the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>6</sup> The lack of actions brought under the Ku Klux Klan Act, now codified at 42 U.S.C. § 1985(3), indicates the initial success of these hostile Supreme Court decisions. No cases involving § 1985(3) were reported for the first forty-nine years of the statute's existence.<sup>7</sup>

The Supreme Court did not adjudicate a § 1985(3) case until 1951, when it decided *Collins v. Hardyman*.<sup>8</sup> In *Collins*, the Court held that for Congress' constitutional power to reach a conspiracy under § 1985(3), there must be "some manipulation of the law or its agencies."<sup>9</sup> This

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act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1994).

The civil component of section two of the Act was first codified as Rev. Stat. § 1980(3). It later appeared at 8 U.S.C. § 47(3) and 42 U.S.C. § 1985(c). This Note will refer to the statute by its current citation.

5. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (limiting the protection of the Thirteenth, Fourteenth, and Fifteenth Amendments to the "one pervading purpose found in them all . . . the freedom of the slave race."); *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that the first section of the Fourteenth Amendment governs only the states and does not "add anything to the rights which one citizen has under the Constitution against another"); *United States v. Harris*, 106 U.S. 629 (1883) (holding the criminal counterpart to § 1985(3) unconstitutional since none of the newly ratified amendments gave Congress power to reach private, non-state action); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875, which prohibited various private acts of racial discrimination, unconstitutional).

6. See generally Gressman, *supra* note 3, at 1336-43; Gormley, *supra* note 3, at 541-46.

7. See Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy*, 26 IND. L.J. 361, 363 (1951) (when this Comment was originally published, § 1985(3) was codified at 8 U.S.C. § 47(3) (1946)).

8. 341 U.S. 651 (1951).

9. *Id.* at 661. The rationale for this state action requirement rested on the premise that only states, not individuals may deprive individuals of their constitutional rights.

[As] fully developed in the Civil Rights Cases, that an individual or group of individuals not in office cannot deprive anybody of constitutional rights, though they may invade or violate those rights, it

limitation not only discouraged § 1985(3) claims, but also caused its coverage to overlap the protection provided by other civil rights legislation codified at 42 U.S.C. § 1983.<sup>10</sup> Section 1985(3) was revitalized twenty years later in *Griffin v. Breckenridge*,<sup>11</sup> where the Court abolished the state action requirement of *Collins*, reasoning that “many of the constitutional problems there perceived [in *Collins*] simply do not exist.”<sup>12</sup> By opening the way for purely private<sup>13</sup> conspiracies to recover under § 1985(3), *Griffin* accorded the “words of the statute their apparent meaning.”<sup>14</sup> However, the Court in *Griffin* added an element to § 1985(3) jurisprudence which has caused conflicting decisions and endless confusion,<sup>15</sup> namely the class-based, invidiously discriminatory animus.

Concerned with the constitutional problems with § 1985(3) being “a general federal tort law,” the Court held that “there must be some racial,

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is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of ‘equal protection of the law’ or of ‘equal privileges and immunities under the law.’

*Id.*

10. See Gressman, *supra* note 3, at 1356. 42 U.S.C. § 1983 provides that [e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983 (1994).

11. 403 U.S. 88 (1971).

12. *Id.* at 96.

13. This Note uses the word “private” to indicate the complete lack of state involvement or state action.

14. *Griffin*, 403 U.S. at 96.

15. The issue has also offered scholars and judges opportunities to showcase their wits by crafting pithy remarks on the resulting confusion. See, e.g., Gormley, *supra* note 3, at 550-52. “[*Griffin*] creat[ed] a jumble of uncertain rules and unsteady boundary lines.” *Id.* “The best that can be said of § 1985(3) jurisprudence thus far is that it has been marred by fits and starts, plagued by inconsistencies, and left in flux by the Supreme Court.” Trautz v. Weisman, 819 F. Supp. 282, 291 (S.D.N.Y. 1993). “Changing interpretation has been the only constant about § 1985(3).” Stevens v. Tillman, 855 F.2d 394, 405 (7th Cir. 1988). “Even after one hundred and sixteen years, four major Supreme Court opinions, colorful legislative history, and over five hundred lower court opinions, there is probably no other federal statute in such complete disarray, distortion, and confusion as . . . § 1985(3).” McDonald, *supra* note 3, at 471.

or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."<sup>16</sup> The *Griffin* Court's short, curt consideration of the class-based animus issue and a general lack of clear instruction in subsequent decisions,<sup>17</sup> have resulted in disagreement among the lower courts.<sup>18</sup> A prime example of this disagreement is the continuing controversy about whether discrimination against individuals with mental and physical disabilities qualifies as a requisite class-based, invidiously discriminatory animus, thereby allowing these individuals to recover under § 1985(3).<sup>19</sup> In *Lake v. Arnold*,<sup>20</sup> the United States Court of Appeals for the Third Circuit answered that question in the affirmative by holding that the mentally retarded are entitled to protection and recovery under § 1985(3).<sup>21</sup> The *Lake* decision, however, is another unfortunate example of the "§ 1985(3) jurisprudence . . . [which] has been marred by fits and starts, plagued by inconsistencies, and left in flux by

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16. *Griffin*, 403 U.S. at 102.

17. See *infra* Part II(B)(1).

18. See *infra* Part I; see also *infra* note 19.

19. See generally *Lake v. Arnold*, 112 F.3d 682, 686 (3d Cir. 1997) (recognizing the disagreement and allowing recovery for the disabled); *D'Amato v. Wisc. Gas Co.*, 760 F.2d 1474, 1486-87 (7th Cir. 1985) (disallowing recovery for the disabled); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983) (prohibiting recovery for handicapped persons); *People by Abrams v. 11 Cornwell*, 695 F.2d 34, 43 (2d Cir. 1982) (holding that mentally disabled individuals are a protected class), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc); *Downs v. Sawtelle*, 574 F.2d 1, 16 (1st Cir. 1978) (holding that the deaf do not constitute a class for § 1985(3) purposes); *Haston v. Tatham*, 4 N.D.L.R. 372 (D. Utah 1994) (holding that disabled people not a recognizable class for § 1985(3) purposes); *Trautz v. Weisman*, 819 F. Supp. 282 (S.D.N.Y. 1993) (mental and emotional disabilities covered); *Tyus v. Ohio Dep't of Youth Servs.*, 606 F. Supp. 239, 246-47 (S.D. Ohio 1985) (handicapped persons covered); *Corkery v. SuperX Drugs Corp.*, 602 F. Supp. 42, 44-45 (M.D. Fla. 1985) (handicapped persons not covered).

*Larson by Larson v. Miller*, 55 F.3d 1343, 1352 (8th Cir. 1995), did hold that handicapped individuals could avail themselves of the protections of § 1985(3). However, the Eighth Circuit later vacated this decision, not reaching the class-based discriminatory animus issue. *Larson by Larson v. Miller*, 76 F.3d 1446 (8th Cir. 1996) (en banc). Since the prior opinion has no value as precedent and presents arguments which are seen elsewhere, it will not be discussed in detail in this Note.

20. 112 F.3d 682 (3d Cir. 1997).

21. *Id.* at 686.

the Supreme Court."<sup>22</sup>

The story of *Lake*, tragically, is not unfamiliar.<sup>23</sup> In June of 1977, sixteen-year-old Elizabeth Arnold Lake, a mentally retarded woman, was taken to Tyrone Hospital by her parents.<sup>24</sup> There, she allegedly underwent a tubal ligation,<sup>25</sup> a sterilization process which prevents future conception by interrupting the continuity of the oviducts.<sup>26</sup> Elizabeth Lake could not have given informed consent to such a procedure as she was both illiterate and mentally disabled.<sup>27</sup> Allegedly, Elizabeth Lake remained oblivious to the nature of the procedure until she received a medical examination in December 1993.<sup>28</sup>

On May 31, 1995, Elizabeth Lake, with her husband, Justin Lake, filed suit in Pennsylvania state court against her parents, Tyrone Hospital, and two hospital physicians, alleging several state law claims, as well as deprivation of civil rights under 42 U.S.C. §§ 1985(3) and 1983.<sup>29</sup> Tyrone Hospital removed the action to the United States District Court for the Western District of Pennsylvania, where all defendants moved to dismiss the claims.<sup>30</sup> A magistrate judge recommended dismissal of the federal claims and remanded the state claims to the Pennsylvania state court.<sup>31</sup> The magistrate judge found the § 1985(3) claim insufficient as "handicapped persons were neither intended to be a class nor reasonably [can] be considered to be a class for [the] purpose of § 1985(3)."<sup>32</sup> The Lakes' § 1983 claim was deemed insufficient because of their failure to adequately allege any state involvement in the conspired misconduct.<sup>33</sup> The district court adopted these

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22. *Trautz v. Weisman*, 819 F. Supp. 282, 291 (S.D.N.Y. 1993).

23. American courts have dealt with the issues surrounding forced sterilization of mentally retarded women from as early as the 1920's. *See, e.g., Buck v. Bell*, 274 U.S. 200 (1927).

24. *See Lake*, 112 F.3d at 684.

25. *See id.*

26. *See* STEDMAN'S MEDICAL DICTIONARY 976 (Marjory Spraycar ed., 26th ed. 1995).

27. *See Lake*, 112 F.3d at 684.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *Lake*, 112 F.3d at 684.

33. *See id.* The Third Circuit overturned the dismissal of the § 1983 claim, expressing a hesitance to dismiss the claim at an earlier pleading stage. *See id.* at 689.

recommendations.<sup>34</sup>

On appeal, the United States Court of Appeals for the Third Circuit, in a question of first impression, addressed the issue of whether Elizabeth Lake's "status as a mentally retarded female places her within a cognizable class entitled to protection under 42 U.S.C. § 1985(3)."<sup>35</sup> In a seven-page opinion by Circuit Judge Mansmann, the Third Circuit reversed the order of the district court, holding that the statute had a wide enough scope to protect handicapped victims of discrimination.<sup>36</sup> The court reasoned that discrimination against the mentally handicapped, like discrimination based on gender, "often rests on immutable characteristics which have no relationship to ability."<sup>37</sup>

The court drew additional support for its holding from several sources. First, the Americans with Disabilities Act of 1990 had found that disabled individuals had "been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness."<sup>38</sup> The court also noted the general increase in recognition among both legislators and courts of the plight of the disabled.<sup>39</sup> Finally, the court recognized that the "discrimination documented against the handicapped in general has been directed particularly at the mentally retarded in the context of involuntary sterilization."<sup>40</sup>

Part I of this Note will sketch the relevant case law prior to *Lake*. Part II will begin with a discussion of the origins of and rationale behind the

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Although the parties cite a plethora of case law regarding standards to be applied in evaluating the presence or absence of state action, the undeveloped record makes application of that case law difficult. While ultimately it will be necessary to navigate 'the legal morass of the ever evolving state action doctrine,' we decline to do so at this early stage in the proceedings.

*Id.* (quoting *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964)).

34. *See id.* at 684.

35. *Id.* (footnote omitted).

36. *Id.* at 687.

37. *Id.*

38. 42 U.S.C. § 12101(a)(7) (1994). The court found it particularly convincing that cases which held handicapped individuals not to be covered by § 1985(3) were decided prior to the enactment of the Americans with Disabilities Act. *Lake*, 112 F.3d at 688 n.11.

39. *See Lake*, 112 F.3d at 688 (citing *Trautz v. Weisman*, 819 F. Supp. 282, 294-95 (S.D.N.Y. 1993)); *see also* 65 U.S.L.W. 1170 ("The ruling [*in Lake*] suggests an evolution in judicial thinking about mental disabilities.").

40. *Lake*, 112 F.3d at 688 (collecting scholarly works on the subject).

class-based animus requirement of § 1985(3), followed by a consideration of the major sources of confusion surrounding the class-based animus test and its presence in the *Lake* decision. Part II will conclude with the suggestion that the class-based animus should not be used as a means of limiting § 1985(3) actions. Part III will establish exactly what rights are protected under § 1985(3) with a subsequent analysis of the *Lake* decision. Part III will also illustrate that the newly proposed scope of § 1985(3) has a narrow scope, but that this narrow scope has no detrimental effects for the handicapped.

### I. FROM *GRIFFIN* TO *LAKE*

The relevant case law prior to *Lake* is a scattered array of opinions appearing at all levels of the federal judiciary. This Part attempts to sketch the history of these scattered cases chronologically, by discussing Supreme Court decisions which provide a detailed analysis of § 1985(3), as well as lower court decisions which apply § 1985(3) to the mentally and physically disabled.

In 1971, as § 1985(3) celebrated its centennial anniversary, the Supreme Court revisited the long-neglected statute. In *Griffin v. Breckenridge*,<sup>41</sup> the Court reviewed a Fifth Circuit decision affirming the dismissal of a suit brought by several black men from Kemper County, Mississippi.<sup>42</sup> The defendants, two white men, under the mistaken belief that the plaintiffs were civil rights workers, blocked off a road, dragged the plaintiffs from their car, and beat them severely.<sup>43</sup> Relying on *Collins*,<sup>44</sup> the district court dismissed the claim because there were no allegations of state action.<sup>45</sup> The Court of Appeals begrudgingly affirmed the dismissal, expressing its “‘serious doubts’ as to the ‘continued vitality’ of *Collins*.”<sup>46</sup>

The Supreme Court rejected the state action requirement of *Collins*

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41. 403 U.S. 88 (1971).

42. *See id.* at 89, 92.

43. *See id.* at 90. The plaintiffs in their § 1985(3) action alleged that the defendants had conspired to deny them of “rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of law.” *Id.*

44. 341 U.S. 651 (1951). *See supra* notes 8, 9 and accompanying text.

45. *Griffin*, 403 U.S. at 92.

46. *Id.* (quoting *Griffin v. Breckenridge*, 410 F.2d 817, 823 (5th Cir. 1969)).



for several reasons. The Court concluded that the constitutional problems, which its decision in *Collins* tried to rectify through the state action requirement, had disappeared through the "evolution of decisional law."<sup>47</sup> In addition, the Court justified the rejection of the state action requirement by looking to the language of § 1985(3) itself. The Court noted that the statute applies to "two or more people in any State or Territory" who "conspire or go in disguise on the highway or on the premises of another."<sup>48</sup> The Court was persuaded that "go[ing] in disguise" would be so infrequently be applicable to official action and more often applicable to "private marauders."<sup>49</sup> Hence, to construe § 1985(3) as requiring state action would render the language of § 1985(3) inapplicable in almost all circumstances.<sup>50</sup> Furthermore, the Court noted that the words "equal protection of the law" and "equal privileges and immunities under the laws" themselves do not require state action.<sup>51</sup> *Griffin* also overturned *Collins* because neither similar Reconstruction civil right statutes<sup>52</sup> nor the legislative history of the Ku Klux Klan Act<sup>53</sup> indicated the need for a state action requirement in § 1985(3).

Immediately after availing § 1985(3) to victims of purely private conspiratorial conduct, *Griffin* limited the statute's scope. Admitting that § 1985(3) "was not intended to apply to all tortious, conspiratorial interferences with the rights of others,"<sup>54</sup> the Court chose to avoid the "constitutional shoals" of interpreting § 1985(3) as "general federal tort law" by instituting a new element into the cause of action.<sup>55</sup> The *Griffin* Court reinterpreted the equal protection language of the statute to require "some racial, or perhaps otherwise *class-based*, *invidiously discriminatory animus* behind the conspirator's action."<sup>56</sup> The Court believed that in so doing they were "giving full effect to the congressional purpose"

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47. *Id.* at 95-96.

48. *Id.* at 96.

49. *Id.*

50. *Id.*

51. *Id.* at 97. "A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons." *Id.*

52. *Id.* at 97-99.

53. *Id.* at 99-101.

54. *Id.* at 101.

55. *Id.* at 102.

56. *Id.* at 101-02.

of § 1985(3).<sup>57</sup>

Ironically, this new element was not listed among the allegations necessary for a plaintiff's complaint to properly state a § 1985(3) cause of action.<sup>58</sup> The Court declined to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under [§ 1985(3)]."<sup>59</sup> The Court also declined to elaborate on the new class-based animus, giving no hints as to what might qualify under the "perhaps otherwise class-based" language of the opinion.

Lastly, the *Griffin* Court identified two grounds for the constitutionality of § 1985(3). First, the Court was confident in Congress' power under section two of the Thirteenth Amendment to prevent private individuals, as well as the States, from imposing any form of slavery.<sup>60</sup> In the alternative, *Griffin* also recognized that the right to interstate travel

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57. *Id.*

58. *Id.* at 102-03.

To come within the legislation a complaint must allege that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'

*Id.* (quoting 42 U.S.C. § 1985(3)).

But *c.f.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (listing class-based, invidiously discriminatory animus among the necessary allegations of § 1985(3)). The *Griffin* decision seems to indicate though that the class-based, invidiously discriminatory animus constitutes part of the second element listed. "The language [of § 1985(3)] requiring intent to deprive of equal protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin*, 403 U.S. at 102; *see also* Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. REV. 911, 917 (1986).

59. *Griffin*, 403 U.S. at 102 n.9.

60. *Id.* at 105.

Surely there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of [the Thirteenth] amendment, 'for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.'

*Id.* (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

"is assertable against private as well as governmental interference."<sup>61</sup> This list of constitutional bases for § 1985(3) was not exclusive<sup>62</sup> and was limited to the factual allegations of the controversy before the Court.<sup>63</sup> With this factually limited holding, *Griffin* presented the Court "no occasion . . . to trace out [§ 1985(3)'s] constitutionally permissible periphery."<sup>64</sup>

The statute was next construed by the First Circuit in *Downs v. Sawtelle*.<sup>65</sup> The court briefly discussed a § 1985(3) claim of a deaf mute against those who allegedly conspired to sterilize her against her will.<sup>66</sup> The court dismissed the § 1985(3) claim because the plaintiff failed to provide legal authority for the proposition that the deaf constitute a protected class and because she failed to allege that the conspiracy was caused by her membership in that class.<sup>67</sup>

A disabled individual first tried to recover damages under § 1985(3) in *Cain v. Archdiocese of Kansas City*.<sup>68</sup> A teacher brought suit against a parochial school which terminated her teaching contract shortly before classes were scheduled to begin.<sup>69</sup> The school explained that the reason for the dismissal was her need to take medication to control a mild case of epilepsy.<sup>70</sup> The United States District Court for the District of Kansas, briefly ruling on her § 1985(3) claim, held that no precedent could be found to justify considering disabled individuals a "class within the meaning of § 1985(3) as construed by the Supreme Court in *Griffin*."<sup>71</sup> Thus, the court declined to enlarge the scope of § 1985(3) to include

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61. *Id.* at 105 (citing *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1968)).

62. *Id.* at 107. "In identifying these two constitutional sources of congressional power, we do not imply the absence of any other." *Id.*

63. *Id.*

64. *Id.*

65. 574 F.2d 1 (1st Cir. 1978).

66. *See id.* at 16.

67. *Id.*

68. 508 F. Supp. 1021 (D. Kan. 1981).

69. *Id.*

70. *Id.* at 1023. Epilepsy is a "chronic disorder characterized by paroxysmal brain dysfunction due to excessive neuronal discharge, and usually associated with some alteration of consciousness. The clinical manifestations of the attack may vary from complex abnormalities of behavior including generalized or focal convulsions to momentary spells of impaired consciousness." *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 26, at 584.

71. *Cain*, 508 F. Supp. at 1027.

disabilities.<sup>72</sup>

In *People by Abrams v. 11 Cornwell Co.*,<sup>73</sup> a New York state agency sought to purchase a home, intending to create a community facility for mentally retarded adults.<sup>74</sup> In an effort to thwart this plan, anxious neighbors living around the proposed center formed a partnership and bought the home before the state agency could react.<sup>75</sup> The state agency sued the partnership alleging, among others, a § 1985(3) claim.<sup>76</sup> On appeal, the United States Court of Appeals for the Second Circuit adopted the state's unopposed argument that the mentally retarded are a class protected by § 1985(3).<sup>77</sup> The court noted that "[c]ases since *Griffin v. Breckenridge* have been generous in applying section 1985(3) to nonracial classifications, even though some of the classifications would not receive strict scrutiny under the equal protection clause."<sup>78</sup> The court fully acknowledged the contrary decisions in *Cain* and *Downs* but did not consider the scant and unconvincing analysis in those cases to "have foreclosed the issue."<sup>79</sup>

The Supreme Court, once again, heard a § 1985(3) case in *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*.<sup>80</sup> This case stemmed from an attack on a non-union construction site by several union sympathizers, which resulted in both vandalism of construction equipment and violence against several construction workers.<sup>81</sup> The plaintiffs sued under § 1985(3), among other claims, to recover for the defendants' conspiracy to deprive them of their First and Fourteenth Amendment rights.<sup>82</sup> The district court held in favor of the plaintiffs.<sup>83</sup>

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72. *Id.*

73. 695 F.2d 34 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc).

74. *Id.* at 37.

75. *Id.*

76. *Id.*

77. *Id.* at 42.

78. *Id.* (collecting examples of such classifications from the Eighth, Sixth, and Ninth Circuits).

79. *Id.* at 43.

80. 463 U.S. 825 (1983) (5-4 decision).

81. *Id.* at 828.

82. *Id.* at 829-30. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I (emphasis added). "[N]or shall any State deprive any person of life, liberty, or property without due process of law; . . ." U.S. CONST. amend XIV, § 1 (emphasis added).

83. *Scott*, 463 U.S. at 829.

The construction company and several of its employees appealed to the Court of Appeals which affirmed the district court's decision.<sup>84</sup> In reversing the Court of Appeals, a narrow majority of the Supreme Court attempted to clarify two aspects of § 1985(3).<sup>85</sup>

First, the Court disagreed with the lower courts' conclusions that a private conspiracy to violate another's First Amendment rights would be actionable under § 1985(3).<sup>86</sup> This holding is premised on the knowledge that § 1985(3) "provides no substantial rights itself" and that "the rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere."<sup>87</sup> Having thus acknowledged the purely remedial nature of § 1985(3), the Court noted that both the First and Fourteenth Amendments guarantee individuals' rights against certain types of governmental infringement.<sup>88</sup> Hence, due to the language of the amendments, "it would be untenable to contend that either of those provisions could be violated by a conspiracy that did not somehow involve or affect a state."<sup>89</sup> A purely private § 1985(3) conspiracy, the Court decided, must be aimed at some rights which are "protected against private, as well as official, encroachment."<sup>90</sup> Without some state involvement, no First or Fourteenth Amendment rights were violated. Without a violation of rights, § 1985(3) could not provide a remedy.

Then, the *Scott* court considered the class-based animus requirement of § 1985(3). The Court rejected the Court of Appeals' interpretation of the historical background of § 1985(3). The Court of Appeals contended that political groups, in particular Republicans, were among the Ku Klux Klan victims in the Reconstruction South for whom § 1985(3) was originally enacted.<sup>91</sup> From this protection of a political group, the Court of Appeals recognized, by analogy, protection for the plaintiffs under § 1985(3) since "an economic group such as those who preferred non-

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84. *Id.* at 829-30.

85. One scholar has suggested that Justice White was motivated to make such clarifications by the desire to save lower courts from analyzing the constitutionality of § 1985(3) every time and by a desire to limit the rising tide of § 1985(3) actions. See Gormley, *supra* note 3, at 557.

86. See *Scott*, 463 U.S. at 830.

87. *Id.* at 833 (citing *Great American Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366, 372 (1979)).

88. See *id.* at 831.

89. *Id.*

90. *Id.* at 833.

91. *Id.* at 835.

union association is 'closely akin' to the animus against political association."<sup>92</sup> The Supreme Court viewed the legislative history presented in support of that assertion with great skepticism.<sup>93</sup> The Court found the legislative history unpersuasive as no evidence could be presented to indicate that § 1985(3) originally aimed at preventing conspiracies based on economic views.<sup>94</sup> This strong language in *Scott* not only denied protection to economic groups, but also indicated the Court's general reluctance to extend § 1985(3) protection beyond race.<sup>95</sup>

Justice Blackmun penned an equally strong dissent criticizing the majority opinion in *Scott*.<sup>96</sup> The dissenters opposed what they viewed as the majority's "crabbed and uninformed reading of the words of § 1985(3)."<sup>97</sup> In response to the contention that § 1985(3) protects against conspiracies to violate First and Fourteenth Amendment rights only if state involvement is shown, the dissent argued that the legislative history of the statute "unambiguously establishes" an intent to prohibit purely private conspiracies to deprive others of all federal rights.<sup>98</sup> The dissent places considerable weight on the fact that, as originally drafted, section two of the Ku Klux Klan Act, which now is codified at § 1985(3), imposed criminal liability for conspiracies to commit certain enumerated acts.<sup>99</sup> In the dissent's opinion, the original draft reflects the

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92. *Id.* at 835-36.

93. *Id.* at 836-38.

94. *Id.* at 837. The Court stated:

We find no convincing support in the legislative history for the proposition that [§ 1985(3)] was intended to reach conspiracies motivated by bias towards others on account of their economic views, status, or activities. Such a construction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended when it passed the provision in 1871.

*Id.*

95. *See id.*

96. Justices Brennan, Marshall, and O'Connor joined in Justice Blackmun's dissenting opinion. *Id.* at 839.

97. *Id.* at 854 (Blackmun, J., dissenting).

98. *Id.* at 841-48.

99. The original version of section two read:

That if two or more persons shall, within the limits of any State, band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge

belief of the legislation's supporters that "the Fourteenth Amendment had altered the balance between the States and the National Government so that Congress now was permitted to protect life, liberty, and property by legislating directly against criminal activity."<sup>100</sup> Although this radical belief was later tempered by subsequent amendments to § 1985(3), the majority of the statute's supporters believed their Fourteenth Amendment powers extended to purely private action.<sup>101</sup>

Further, the dissent deemed the remarks of Representative Garfield indicative of another justification for the statute's reach. Garfield stated that when states fail to provide equal protection, "it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights [guaranteed by the Civil War Amendments], and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment."<sup>102</sup> Garfield's belief is a consistent thread throughout the debates on section two of the Ku Klux Klan Act.<sup>103</sup> The dissent likewise stated with confidence that "Congress did not intend any requirement of state involvement in either a civil or criminal action under section two."<sup>104</sup>

In response to the majority's approach to the class-based animus issue, the dissent asserted that "Congress intended to provide a federal remedy for all classes that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence."<sup>105</sup> The classes protected were not to be determined by simple categories,

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of official duty, arson, or larceny; and if one or more of the parties to said conspiracy shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy, whether principals or accessories [sic], shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable, &c., and the crime shall be punishable as such in the courts of the United States.

CONG. GLOBE, 42d Cong., 1st Sess., App. 68-69 (March 28, 1871) (statement of Rep. Shellabarger) (quoting H.R. 320, § 2, 42d Cong., 1st Sess. (1871)).

100. *Scott*, 463 U.S. at 842 (Blackmun, J., dissenting).

101. *Id.* at 842 (Blackmun, J., dissenting). Justice Blackmun stated that the moderate Republicans, who supported these amendments and who held considerable sway in that Congress, believed that "Congress had authority to reach private conduct by virtue of its power to protect the rights of national citizenship. They believed that the Fourteenth Amendment rights were possessed by persons regardless of the presence of state action." *Id.*

102. CONG. GLOBE, 42d Cong., 1st Sess., App. 153 (Apr. 4, 1871).

103. *Scott*, 463 U.S. at 846 (Blackmun, J., dissenting).

104. *Id.*

105. *Id.* at 851.

but rather by a "functional definition" which would reflect the 1871 Congress' concern for those groups which might suffer from a "systematic maladministration of [the laws]" due to prejudice or bias.<sup>106</sup> Applying this test to *Scott*, the dissent felt economic groups clearly fell within the intended protection of § 1985(3).<sup>107</sup> Further, the majority's failure to protect economic-based groups clashed with the dissenting justices' historical understanding of Reconstruction.<sup>108</sup> According to the dissent, "economic migrants," such as carpetbaggers and the newly freed slaves, who flooded labor markets in the years following the Civil War, were prime targets of Klan violence.<sup>109</sup>

The protection of disabled individuals under § 1985(3) was next considered by the United States Court of Appeals for the Tenth Circuit in *Wilhelm v. Continental Title Company*.<sup>110</sup> There, the defendant company fired the plaintiff shortly after learning that he had multiple sclerosis.<sup>111</sup> The district court dismissed his § 1985(3) claim for failure to adequately allege that his discharge was invidious.<sup>112</sup> In affirming the dismissal, the court of appeals in *Wilhelm* relied heavily on the *Scott* decision's analysis of § 1985(3)'s legislative history.<sup>113</sup> In light of *Scott*, the Tenth Circuit saw no reason to extend § 1985(3) protection to "classes other than those involved in the strife in the South in 1871 with which Congress was then concerned."<sup>114</sup> The opinion in *Wilhelm* warned that "[i]n fact from *Scott* we get a signal that the classes covered by § 1985(3) should not be extended beyond those already expressly provided by the [Supreme] Court."<sup>115</sup>

The *Wilhelm* court went on to consider whether handicapped individuals were a class for the purposes of § 1985(3). The court did not

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106. *Id.*

107. *Id.* at 852-54.

108. *Id.*

109. *Id.* at 852.

110. 720 F.2d 1173 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

111. *Id.* at 1174. Multiple sclerosis is defined as "a common demyelinating disorder of the central nervous system, causing patches of sclerosis (plagues) in the brain and spinal cord." *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 26, at 1583.

112. *Wilhelm*, 720 F.2d at 1175 (explaining the requirement that "the class must be invidious and the conspiracy against the plaintiff was 'because' of class membership").

113. *Id.* at 1175-76.

114. *Id.* at 1176.

115. *Id.*



allow this application of the statute since "the variations in each category [of disability] are infinite and as a consequence the term 'handicapped' does not have a definition capable of a reasonably precise application."<sup>116</sup> The court stated that it would be compelled by *Scott* to affirm "even if there could be here developed by further pleadings a class of handicapped persons with sufficient conditions or factors in common derived from their physical condition to be ascertainable or identifiable."<sup>117</sup> Clearly, the *Wilhelm* court interpreted the *Scott* decision to have limited § 1985(3) protection solely to those classes which were victims of the Ku Klux Klan's violence and mayhem in the Reconstruction South.

In *Corkery v. SuperX Drugs Corp.*,<sup>118</sup> the United States District Court for the Middle District of Florida followed the lead of the *Wilhelm* decision. There, the plaintiff brought a § 1985(3) claim against his employer when he was terminated after having serious congestive heart failure at the age of forty-two.<sup>119</sup> Advancing the same arguments as and citing to *Wilhelm*, the court denied protection to the handicapped because they were not "a class contemplated or protected by § 1985(3)."<sup>120</sup> The court distinguished its holding from the contrary decision expressed in *People by Abrams* by noting that the "mentally handicapped" in that case constituted a more limited class than the broad group of "handicapped individuals" presented in the instant case.<sup>121</sup>

In *Tyus v. Ohio Department of Youth Services*,<sup>122</sup> the United States District Court for the Southern District of Ohio apparently did not receive the same signal as the *Wilhelm* and *Corkery* courts. Here, a man brought suit against an Ohio state agency for discharging him because of his epilepsy.<sup>123</sup> *Tyus* recognized the fact that § 1985(3) was originally

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116. *Id.*

117. *Id.*

118. 602 F. Supp. 42 (M.D. Fla. 1985).

119. *Id.* at 44. Congestive heart failure results from an "inadequacy of the heart so that as a pump it fails to maintain the circulation of the blood, with the result that congestion and edema develop in the tissues." STEDMAN'S MEDICAL DICTIONARY, *supra* note 26, at 626.

120. *Corkery*, 602 F. Supp. at 44.

121. *See id.* at 44-45. The plaintiff asserted in his complaint that he was a "member of the class of handicapped employees toward whom the conspirators' discriminatory animus was directed." *Id.* at 44.

122. 606 F. Supp. 239 (S.D. Ohio 1985).

123. *Id.* at 241. For a definition of epilepsy, *see supra* note 70.

enacted for the protection of blacks and union sympathizers in the South.<sup>124</sup> However, this original intent was irrelevant because “§ 1985(3) makes no references to race, but rather prohibits conspiracies to deprive any person of the equal protection of the laws.”<sup>125</sup> By analogizing § 1985(3) to other Reconstruction legislation, *Tyus* extended the statute’s protection beyond its original beneficiaries to any citizen. Just as the Thirteenth and Fourteenth Amendments are not to be limited to protecting only those for whom they were originally enacted, so should § 1985(3) be free from such artificial restrictions.<sup>126</sup> Further, *Tyus* justified the extension of § 1985(3) to disabled people by noting that they often are burdened by a “stigma of inferiority” and a lack of significant political power.<sup>127</sup>

The issue was next considered by the United States Court of Appeals for the Seventh Circuit in *D’Amato v. Wisconsin Gas Company*.<sup>128</sup> The plaintiff brought suit alleging a § 1985(3) claim after he was discharged by a government contractor because his acrophobia<sup>129</sup> prevented him from going into tall buildings as his job required.<sup>130</sup> In denying disabled individuals the opportunity to recover under § 1985(3), the Seventh Circuit adopted the strict reading of class-based animus found in the *Scott* and *Wilhelm* decisions. Concern about extending § 1985(3) beyond its originally intended parameters dissuaded the court in *D’Amato* from extending the statute to the handicapped.<sup>131</sup> The *D’Amato* court also focused on the difficulty in defining the class of disabled individuals which varies “greatly from immediately noticeable physical handicaps to ones not at first obvious or those revealed only by a medical exami-

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124. *Id.* at 246.

125. *Id.* at 245-46.

126. *Id.* The court stated that:

The language of § 1985(3) gives no indication that racial discrimination is a requisite element of a cause of action thereunder. To engraft such a limitation would bring the statute into anomalous contrast with comparable Reconstruction civil rights legislation, under which a wide variety of nonracial classes have won relief from discriminatory treatment.

*Id.*

127. *Id.* at 247.

128. 760 F.2d 1474 (7th Cir. 1985).

129. “A morbid fear of heights.” *STEDMAN’S MEDICAL DICTIONARY*, *supra* note 26, at 19.

130. *D’Amato*, 760 F.2d at 1476.

131. *Id.* at 1486. “The legislative history of section 1985(3) does not suggest a concern for the handicapped.” *Id.*

nation.”<sup>132</sup> Further, the Seventh Circuit was hesitant to consider the handicapped as a class, because some handicaps “may be overcome” and because “being handicapped is not a historically suspect class such as race, national origin, or sex.”<sup>133</sup>

Section 1985(3) was later considered by the Supreme Court in its controversial<sup>134</sup> decision *Bray v. Alexandria Women's Health Clinic*.<sup>135</sup> In this case, abortion clinics and abortion rights organizations brought a § 1985(3) claim against Operation Rescue, an antiabortion organization, to enjoin their attempts to block and deny access to various abortion clinics in the Washington, D.C. metropolitan area.<sup>136</sup> Justice Scalia's majority opinion<sup>137</sup> first dealt with the issue of whether “opposition to abortion” formed an appropriate class-based animus. It then considered whether the rights denied by Operation Rescue were covered by § 1985(3).

*Bray's* discussion of class-based animus begins by defining what cannot be included in such an animus. To prevent § 1985(3) from being a “general federal tort law,” a class-based animus cannot simply be a “group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors.”<sup>138</sup> Citing Blackmun's dissent in *Scott*, Justice Scalia held that “women seeking abortions” could not be a class for the purposes of § 1985(3) because a class “cannot be defined simply as the group of victims of the tortious action.”<sup>139</sup>

The Court also held that Operation Rescue's protests were not a gen-

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132. *Id.*

133. *Id.*

134. For a highly critical treatment of the *Bray* decision see, Georgia M. Sullivan, Note, *Protection of Constitutional Guarantees under 42 U.S.C. Section 1985(3): Operation Rescue's "Summer of Mercy"*, 49 WASH. & LEE L. REV. 237 (1992).

135. 506 U.S. 263 (1993).

136. *Id.* at 266.

137. Justice Kennedy wrote a concurring opinion which notes that the dissenting opinions do not agree on a common rationale and that 42 U.S.C. § 10501 provides for federal intervention in situations where “state and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law.” *Id.* at 287 (citing 42 U.S.C. § 10502(3) (1994)). Justice Souter wrote an opinion concurring in part and dissenting in part. *Id.* at 288. Justice Stevens dissented in an opinion which Justice Blackmun joined. *Id.* at 307. Justice O'Connor also wrote a dissenting opinion which Justice Blackmun also joined. *Id.* at 345.

138. *Bray*, 506 U.S. at 269.

139. *Id.* (citing *Scott*, 463 U.S. at 850 (Blackmun, J., dissenting)).

eral class-based discrimination against women. Adopting a standard from equal protection jurisprudence,<sup>140</sup> *Bray* required that class-based animus affect a "discriminatory purpose . . . [which] implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>141</sup> Simply because Operation Rescue's blockades infringed on a woman's right to enter an abortion clinic more than a man's, because only women can become pregnant, this did not necessarily imply that its actions were discriminatory against women *per se*.<sup>142</sup> Refusing to equate Operation Rescue's actions with such invidious discrimination as racism, the Court held that "[t]his is not the stuff out of which a § 1985(3) 'invidiously discriminatory animus' is created."<sup>143</sup>

The *Bray* Court also could not identify any § 1985(3) protection against a private conspiracy which applied to the rights of the abortion clinics. The respondent clinics first argued that Operation Rescue's activities denied persons the right to interstate travel because their patients sometimes traveled from other states to come to their clinics.<sup>144</sup> This argument was rejected because denial of interstate travel was not the sole purpose of Operation Rescue's protests,<sup>145</sup> and because previously the Court held that denial of the right of interstate travel requires either a physical restraint of travel at state borders or discriminatory treatment against interstate travelers.<sup>146</sup> The Court also ruled the respondents' second asserted right, the right to an abortion, to be an inadequate basis for

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140. The Court was careful to point out that this standard was not adopted because equal protection jurisprudence is simply automatically incorporated into § 1985(3) analysis, but because "it is inherent in the requirement of class-based animus, i.e., an animus requirement based on class." *Id.* at 273 n.4.

141. *Id.* at 271-72 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979)).

142. 506 U.S. at 271.

143. *Id.* at 274.

144. *Id.* at 274.

145. *Id.* at 276. "A conspiracy is not 'for the purpose' of denying equal protection simply because it has an effect upon a protected right." *Id.* Here, Operation Rescue's opposition to abortion was not an attempt to restrict interstate travel. Clearly, "it is irrelevant to their opposition whether the abortion is performed after interstate travel." *Id.*

146. *Id.* at 277 (citing *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)).

their § 1985(3) claim.<sup>147</sup> The Court reaffirmed the strict view of the *Scott* decision, that § 1985(3) only prohibits conspiracies "aimed at interfering with rights . . . protected against private, as well as official, encroachment."<sup>148</sup> Justice Scalia admitted that few rights fall into this category,<sup>149</sup> but strongly asserted that the right to an abortion simply was not one of these rights.<sup>150</sup>

In *Trautz v. Weisman*,<sup>151</sup> the United States District Court for the Southern District of New York heard a § 1985(3) claim brought by the residents of a facility for the mentally and emotionally disabled against the owners and operators of the facility. The complaint alleged that the deplorable conditions there resulted from a conspiracy to deny its residents equal protection.<sup>152</sup> The court in *Trautz* focused solely on whether there was discriminatory class-based animus.<sup>153</sup> The court first noted two standards for determining whether § 1985(3) protection extended to a particular minority. The group could either be "discrete and insular," receiving special protection under the equal protection clause because of inherent personal characteristics,<sup>154</sup> or a "well-defined and traditionally disadvantaged group."<sup>155</sup> *Trautz* then attacked the *D'Amato* decision for failing to place the disabled in either of these categories. The court asserted that, although a disability may not be apparent, "it remains an inherent personal characteristic."<sup>156</sup> Further, *Trautz* observed that the very fact that a disability may be overcome indicates that a disability is "an immutable obstacle often created only by an accident of birth, not

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147. *Id.* at 278.

148. *Id.* at 278 (citing *Carpenters v. Scott*, 463 U.S. 825, 833 (1983)).

149. *Id.* (listing only the Thirteenth Amendment right to be free from slavery and the right to interstate travel).

150. *Id.* Justice Scalia argued that it would be "peculiar" to grant the right of abortion "that preferred position," of being protected against private encroachment, while other rights more explicit in the Constitution, like the right to free speech, do not hold that status. *Id.* He further noted that the more general right to privacy, from which the right of abortion is derived, clearly is not protected against private infringement. *Id.* "A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth." *Id.*

151. 819 F. Supp. 282 (S.D.N.Y. 1993).

152. *Id.* at 284-85.

153. *Id.* at 290 n.5.

154. *Id.* at 291 (citing *Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980)).

155. *Id.* (citing *Orshan v. Anker*, 489 F. Supp. 820 (E.D.N.Y. 1980)).

156. *Id.* at 292.

unlike race, gender, or national origin.”<sup>157</sup> The court proceeded to strengthen its argument by pointing to the language of the Americans with Disabilities Act of 1990,<sup>158</sup> which, in the court’s opinion, clearly “represents a comprehensive national mandate to eliminate discrimination against individuals with disabilities.”<sup>159</sup> *Trautz* also criticized *D’Amato*’s devotion to restricting § 1985(3)’s protection to the originally intended recipients by pointing out that two groups, women and religious minorities, were clearly not within the original ambit of § 1985(3) in 1871, but receive protection under the statute today.<sup>160</sup>

## II. THE CONFUSION OF THE CLASS-BASED, INVIDIOUSLY DISCRIMINATORY ANIMUS

Since *Griffin*, the class-based, invidiously discriminatory animus requirement has caused great confusion in § 1985(3) jurisprudence, leading to incongruous court decisions. Women were granted protection under § 1985(3) by some courts,<sup>161</sup> while other courts denied such protection.<sup>162</sup> Federal officers were protected,<sup>163</sup> but county sheriff’s officers

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157. *Id.*

158. 42 U.S.C. § 12101. The findings and purposes section of that Act provides in relevant part:

Unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often no legal recourse to redress such discrimination. . . . Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals . . . .

42 U.S.C. § 12101(a)(4), (7).

159. *Trautz*, 819 F. Supp. at 294.

160. *Id.* (citing *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (extending protection to women); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (extending protection to religious groups)).

161. *See Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995) (women are a “protected class”); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982) (class-based sex discrimination is actionable under § 1985(3) actions); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978). *See generally* Annotation, *Applicability of 42 U.S.C. § 1985(3) to Sex-Based Discrimination*, 46 A.L.R. FED 342 (1980).

162. *See Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971).

163. *See Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (dicta).

were not.<sup>164</sup> Perhaps more illustrative of the incoherence that the issue has engendered is the case in which members of a single white, middle class family were protected under § 1985(3),<sup>165</sup> while groups of families were turned away.<sup>166</sup> The inconsistency of certain federal courts extending § 1985(3) protections to disabled individuals while other courts deny these protections also demonstrates the confusion surrounding the statute.

#### *A. The Birth and Invalidity of the Class-Based Animus Requirement*

The single paragraph in *Griffin* which injects the class-based animus element into § 1985(3) jurisprudence evidences concern surrounding the expansion of the statute beyond a point which might upset the balance of power between the federal and state governments.<sup>167</sup> The Court made it clear that the invidiously discriminatory animus element was created to prevent the statute from becoming a "general federal tort law."<sup>168</sup> The *Griffin* court cites the comments of Representatives Willard and Shellabarger to justify the contention that class-based animus was the "congressional purpose."<sup>169</sup>

164. See *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir.), *cert. denied*, 454 U.S. 711, 717 (1981).

165. See *Azar v. Conley*, 456 F.2d 1382, 1386 (6th Cir. 1972).

166. See *Smith v. Armstrong*, 396 F. Supp. 753 (N.D. Tex.), *aff'd*, 524 F.2d 1231 (5th Cir. 1975).

167. The federal government is one of limited powers, possessing only those powers affirmatively granted to it in the Constitution. The rest of the powers of governance remain in the hands of the states. See U.S. CONST. AMEND X. If § 1985(3) was interpreted broadly and allowed to reach any private conspiracy, then almost every crime, tort, and breach of contract committed by two or more people would fall within the scope of the statute. Such federal enforcement of protection traditionally provided by the states would clearly upset the balance of federalism. In this sense, a general federal tort law is impermissible. See generally GERALD GUNTHER, CONSTITUTIONAL LAW 77-78 (12th ed. 1991).

168. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

*Id.*

169. CONG. GLOBE, 42d Cong., 1st Sess., App. 188 (1871). Representative Willard argued that inserting the "equal protection" and the "equal privileges and

However, this concern over the constitutional problems of an overly broad § 1985(3) seems to be more that of the Court than that of the Forty-Second Congress. Admittedly, the statute's draftsmen in 1871 envisioned a certain type of intent to prevent § 1985(3) from being used as a federal usurpation of state powers.<sup>170</sup> However, it was the Court in 1971 which defined this intent as being "class-based." No mention of a class-based requirement exists anywhere in the legislative history.<sup>171</sup> Nor does the legislative history indicate an intent to limit the scope of § 1985(3) to the prevention of racial bias, as the *Scott* opinion suggests.<sup>172</sup> Thus, even though some discriminatory intent was required by the Forty-Second Congress, the *Griffin* Court unjustifiably added the class-based aspect on the basis of history.

On the other hand, the comments of Representatives Willard and Shellabarger clearly illustrate that some type of mens rea requirement was intended.<sup>173</sup> Because § 1985(3) was meant to curb the activities of the Ku Klux Klan in the Reconstruction South,<sup>174</sup> one can assume that its draftsmen in 1871 wished to require an intent somewhat akin to the mental state which drove the Klan to their heinous acts. However, such hatred, bigotry, and ignorance are hard to describe in mere words. The

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immunities" language,

provid[ed] that the essence of the crime should consist in the *intent to deprive* a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality.

*Id.*

Representative Shellabarger stated that

The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizen's rights, shall be within the scope of the remedies of this section.

CONG. GLOBE, 42d Cong., 1st Sess., 478 (1871).

170. See CONG. GLOBE, 42d Cong., 1st Sess., 478 (1871) (comments of Rep. Shellabarger).

171. See McDonald, *supra* note 3, at 489. "The status of victims [protected by § 1985(3)] basically was irrelevant." *Id.* at 491; see also Shatz, *supra* note 58, at 928-29.

172. See Shatz, *supra* note 58, at 929.

173. See *supra* note 162.

174. See *supra* note 3.



terms "class-based, invidious discriminatory animus" hardly seem to adequately characterize the sadistic and evil thoughts which must have filled the hearts and minds of Klan members as they lynched black men throughout the South. In other words, the terms' inadequacy, and thus the confusion surrounding class-based animus, could have resulted from a difficulty of description.

### B. More "Class-Based" Confusion

Some of the confusion surrounding the *Griffin* Court's requirement of a class-based, invidiously discriminatory animus can be attributed to the semantic problem mentioned above. This, however, is not the sole source of the confusion. Two other factors are clearly at fault. In general, the U.S. Supreme Court has failed to provide helpful guidance on the proper determination of class-based animus. Furthermore, lower federal courts have mistakenly shifted their focus in the determination of class-based animus from the defendant's intent to the plaintiff's status.

#### 1. Lack of Guidance from Supreme Court

The jurisprudence of § 1985(3) has not been well-developed by the Supreme Court. The Court's treatment of the class-based animus issue has been especially scant. The *Griffin* opinion did not elaborate on what was meant by its insistence that "there be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."<sup>175</sup> In a footnote to this language, the Court explicitly declined to comment on the possible extent of the "perhaps" clause.<sup>176</sup> Since the Court introduced the class requirement into § 1985(3), the Court has had the opportunity to construe the statute only three additional times.<sup>177</sup> In one such occasion, the Court reversed the lower decision without even reaching the class-based animus issue.<sup>178</sup> By leaving

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175. See *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

176. See *id.* at 102 n.9. "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Id.*

177. See *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979); *United Bhd. of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

178. See *Novotny*, 442 U.S. at 378 (holding that § 1985(3) may not be invoked to redress violations of Title VII without addressing class-based animus). After being discharged, a male employee brought suit under § 1985(3) against his former

the lower courts to formulate their own differing standards of class-based animus, the Supreme Court has contributed to the confusion surrounding § 1985(3).<sup>179</sup>

However, blame should cautiously be placed on the Supreme Court. The Court has had only limited opportunities to discuss the class-based animus requirement of § 1985(3).<sup>180</sup> On these occasions, of course, the justices were only empowered to rule on the particular facts presented in the case at hand and the controversies before them.<sup>181</sup> Although the lower courts would benefit greatly from a long, illuminating Supreme Court opinion detailing the exact length and breath of § 1985(3), such a decision may be both imprudent and unconstitutional. The Supreme Court has not provided extensive guidance on § 1985(3), but perhaps it has not had any cases which presented the opportunity for providing such guidance.

## 2. *Mistaken Shift in Focus*

The Klan's terror in the Reconstruction South clearly was aimed at

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employer claiming that his support for his fellow female employees resulted in a conspiracy which deprived him of rights created by Title VII of the Civil Rights Act of 1964. *Id.* at 368-69. The Court concluded that "§ 1985(3) may not be invoked to redress violations of Title VII." *Id.* at 378. The Court did not address the class-based animus issues confronted by the Third Circuit, i.e. whether § 1985(3) protected against a discriminatory animus against women and whether a male injured by such a conspiracy can also recover under the statute. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1240-45 (3d Cir. 1978), *rev'd* 442 U.S. 366 (1979).

179. See John Gibeaut, *Reproductive, Disability Rights Mix in KKK Act Cases*, 83 A.B.A. J. 36 (Aug. 1997). "Like the Scarecrow in the *Wizard of Oz*, the 3rd Circuit could have gone either way [in the *Lake* decision]." *Id.* at 36. "But the [Supreme] Court has not drawn an exact line on what constitutes a class, leaving the lower courts to figure it out for themselves." *Id.* at 36-37.

180. See *Griffin*, 403 U.S. at 102 n.9. "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Id.*

181. "The judicial Power [of the Supreme Court] shall extend to all Cases, in Law and Equity . . . [and] to Controversies between two or more States . . ." U.S. CONST. art. III, § 2. For a discussion of the case and controversy limit on the Court's judicial power and the Court's prudential hesitance to give advisory opinions, see generally, GERALD GUNTHER, *CONSTITUTIONAL LAW* 1590-98 (12th ed. 1991). "Ever since [1793], it has been accepted that federal courts cannot give advisory opinions." *Id.* at 1594.

various "classes."<sup>182</sup> Hence, the *Griffin* inclusion of the term "class-based" in the intent requirement of § 1985(3) seems appropriate. The confusion in interpreting the class-based animus, however, has resulted from lower courts focusing too heavily on the classifications of § 1985(3) plaintiffs. Even though the language of *Griffin* requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus *behind the conspirators' [defendants'] action*,"<sup>183</sup> courts have mistakenly addressed the issue in terms of whether the plaintiff's class qualifies for § 1985(3) protection.<sup>184</sup> The question was, "What classes qualify?" The answer was considered in the abstract, making reference mostly to the characteristics of the plaintiff's class, with little reference to the actual animus of the conspirators.<sup>185</sup>

Through this mistaken analysis, several "tests" have developed to determine the parameters for class qualifications under § 1985(3). These tests have been difficult to justify and even more difficult to distinguish from one another.<sup>186</sup> Some of these tests granted protection only to

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182. See CONG. GLOBE, 42d Cong., 1st Sess., 317 (remarks of Rep. Shellabarger).

183. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added).

184. See, e.g., *D'Amato v. Wisc. Gas Co.*, 760 F.2d 1474, 1486-87 (7th Cir. 1985); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983); *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 42 (2d Cir. 1982); *Cain v. Archdiocese of Kansas City*, 508 F. Supp. 1021, 1027 (D. Kan. 1981).

185. See, e.g., *Lake v. Arnold*, 112 F.3d 682, 684-85; *infra* Part II(C) on confusion in *Lake*; *Downs v. Sawtelle*, 574 F.2d 1, 16 (1st Cir. 1978) (dismissing action because plaintiff "failed to present authority for her assertion that the deaf constitute a class for the purposes of 42 U.S.C. sec. 1985"); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1240-41 n.19 (3d Cir. 1978) (collecting cases establishing which classes qualify and which do not); *Cain v. Archdiocese of Kansas City*, 508 F. Supp. 1021, 1027 (D. Kan. 1981) ("We have been unable to discover any cases . . . which hold that handicapped persons constitute a 'class' within the meaning of § 1985(3)."); *United Bhd. of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825, 836-37 (1983); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983) ("The variations in each category [of disability] are infinite and as a consequence the term 'handicapped' does not have a definition capable of a reasonably precise application for [§ 1985(3)] purposes."); *Tyus v. Ohio Dept. of Youth Serv.*, 606 F. Supp. 239, 247 (S.D. Ohio 1985) (considering whether the handicapped qualify as a class); *D'Amato v. Wisc. Gas Co.*, 760 F.2d 1474, 1486 (7th Cir. 1985) (considering the nature of being handicapped in the determination of whether they constitute a class); *Trautz v. Weisman*, 819 F. Supp. 282, 291-95 (S.D.N.Y. 1993).

186. For works which collect these tests and argue the relative merits of each

groups deemed to be within the historical intent of § 1985(3);<sup>187</sup> some granted protection to “discrete and insular” minorities;<sup>188</sup> some granted protection to groups with immutable characteristics;<sup>189</sup> some granted protection to classes warranting strict scrutiny;<sup>190</sup> and still others protected only those groups which were clearly defined.<sup>191</sup> The shift in focus from the defendant’s discriminatory intent to the plaintiff’s membership in a class allowed scholars to compile comprehensive lists of groups which received protection under § 1985(3).<sup>192</sup> Perhaps, the shift in focus can be attributed to the ease with which a court can determine whether a particular class deserves protection. A court may be tempted to abdicate its duty when faced with the relatively more difficult task of determining the highly factual question of whether a defendant’s actions were invidiously discriminatory. Whatever the reason, this mistaken shift in focus, along with the lack of Supreme Court guidance, is one of the prime culprits contributing to the confusion and incongruity lingering in the class-based animus issue.

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see, *Class-Based Animus*, *supra* note 2, at 645-53; Devin S. Schindler, Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 83 MICH. L. REV. 88, 92-102 (1985); Gormley, *supra* note 3, at 575-77.

187. See *Scott*, 463 U.S. at 836-38; *Wilhelm*, 720 F.2d at 1176.

188. See, e.g., *Lake*, 112 F.3d at 687; *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 203 (7th Cir. 1985); *Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980); *Trautz*, 819 F. Supp. at 291. See generally, Gormley, *supra* note 3, at 575 (arguing for the use of the discrete and insular minority test).

189. See, e.g., *Lake*, 112 F.3d at 687; *Novotny*, 584 F.2d at 1243, *rev'd on other grounds*, 442 U.S. 366 (1979); *Diulus v. Churchill Valley Country Club*, 601 F. Supp. 677, 681 (W.D. Pa. 1985); *Santigo v. City of Philadelphia*, 435 F. Supp. 136, 156 (E.D. Pa. 1977). See generally, Schindler, *supra* note 186, at 95-98; *Class-Based Animus*, *supra* note 2, at 650-51.

190. See, e.g., *Browder*, 630 F.2d at 1150; *Kenyatta v. Moore*, 623 F. Supp. 224, 230 (S.D. Miss. 1985).

191. See, e.g., *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973); *Bricker v. Crane* 468 F.2d 1228, 1233 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Azar v. Conley* 456 F.2d 1382, 1386 n.5 (6th Cir. 1972); *Scott v. Moore*, 461 F. Supp. 224 (E.D. Tex. 1978). See generally, Schindler, *supra* note 186, at 92-95; *Class-Based Animus*, *supra* note 2, at 646-47.

192. See, e.g., 3 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS § 13.09[A] (1997); 2 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 15.04[4] (3d ed. 1994).

### C. Class Confusion in *Lake*

The Third Circuit's decision in *Lake* clearly was tainted with this class confusion. The Third Circuit described the issue as "a question of first impression, whether a *plaintiff's status* as a mentally retarded female places her within a *cognizable class* entitled to protection under [§ 1985(3)]."<sup>193</sup> The case is an appeal from the district court's dismissal, which was based on the finding that "*Elizabeth Lake's membership* in the class of handicapped individuals did not entitle her to the protection afforded by section 1985(3)."<sup>194</sup> With the issue couched in this manner, the court, looking solely to the plaintiff's membership in a class, completely failed to focus on and analyze whether the defendant's intent was invidiously discriminatory. The Third Circuit discussed in detail the characteristics of the handicapped as a class; that a disability is an "immutable characteristic,"<sup>195</sup> that the disabled are a "discrete and insular minority,"<sup>196</sup> and that the disabled have suffered a "history of discrimination."<sup>197</sup> All of these considerations factored into the decision that the handicapped could qualify for protection under § 1985(3). It is ironic that the class-based animus, which theoretically constitutes part of the second element listed in *Griffin*, that is purposely depriving another of the equal protection of the laws,<sup>198</sup> was determined without any examination of the defendant's actions. This irony is typical of the confusion in § 1985(3) jurisprudence caused by the mistaken shift in analysis from the defendant's intent to the plaintiff's class.<sup>199</sup>

### D. An End to Class Confusion: A Proposal

Ending the confusion about the class-based animus issue does not involve changing the *Griffin* requirement of a "class-based, invidiously discriminatory animus," but rather involves changing the analysis of that language in two essential ways. The invidious discriminatory intent of the conspirators should be considered more vigorously and the class-based aspect of the conspirators' animus should be deemphasized.

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193. *Lake*, 112 F.3d at 684 (footnote omitted, emphasis added).

194. *Id.* at 685 (emphasis added).

195. *Id.* at 687.

196. *Id.* (quoting the Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7)).

197. *Id.* at 688 (quoting the Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7)).

198. See *Griffin v. Breckenridge*, 403 U.S. 88, 97-98 (1971).

199. See, e.g., *id.* at 102.

### 1. More Focus on Discriminatory Intent

Essentially, the second half of the *Griffin* language should be applied first. A court faced with a § 1985(3) complaint should initially scrutinize the conspirators' actions to determine the presence of invidious discrimination. While this may seem like an extraordinarily difficult threshold inquiry for busy district courts to make, several sources could aid their analysis.

The Supreme Court in *Bray* adopted a standard for discriminatory purpose from equal protection jurisprudence. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>200</sup> As long as the discrimination was against a known class, and as long as the bias was "because of" class membership, then a requisite invidiously discriminatory animus would be present.

Furthermore, *Bray* implied that this discriminatory intent must be so invidious as to almost rise to the level of racism.<sup>201</sup> Thus, an invidiously discriminatory animus will be found when a defendant's conduct is justifiably associated with the ugliness of racism.<sup>202</sup>

Tempted by a desire to make this rather nebulous standard more definite, one might propose that a specific intent requirement replace the class-based animus requirement of § 1985(3). The statute's criminal counterpart, 18 U.S.C. § 241,<sup>203</sup> has been interpreted to require such a

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200. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (quoting *Personnel Adm'n of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis added).

201. *Id.* at 274. The Court observed that "the nature of the 'invidiously discriminatory animus' *Griffin* had in mind is suggested both by the language used in that phrase . . . and by the company in which the phrase is found." *Id.* (internal citations omitted).

202. For an explanation of another court applying this type of "akin to racism" analysis, see, for example, *Cartolano v. Tyrell*, 421 F. Supp. 526, 532 (N.D. Ill. 1976). "The 'class-based, invidiously discriminatory animus' referred to in *Griffin* relates to that kind of irrational and odious class discrimination akin to racial bias - such as discrimination based on national origin or religion." *Id.* (quoting *Arnold v. Tiffany*, 329 F. Supp. 1034, 1036 (C.D. Cal.), *aff'd*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974)).

203. It is a felony if "two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of

"specific intent to interfere with [another's] federal rights."<sup>204</sup> However, the *Griffin* Court explicitly rejected any specific intent requirement for § 1985(3).<sup>205</sup> *Griffin* made it clear that since "§ 1985(3), unlike § 242 [or § 241], contains no specific requirement of 'willfulness,' . . . [t]he motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus."<sup>206</sup> This strong language would also seem to reject the Court's prior interpretation in *Snowden v. Hughes*,<sup>207</sup> which required a showing of "purposeful discrimination." Interestingly though, the *Snowden* language was not expressly overruled by *Griffin*; rather, "purposeful discrimination" was simply not applied to § 1985(3).

## 2. Reduced Focus on Class

While the second part of the *Griffin* language is applied first, the first part should be applied second, and applied in an extremely broad manner. Any class which is readily and easily definable<sup>208</sup> should be allowed to qualify for the "class-based" requirement of *Griffin*. This minimal requirement of class membership should be retained, and not discarded completely, because the Klan violence discriminated against individuals based on such membership in various groups, including blacks, union sympathizers, and Republicans. However, picking and choosing which classes qualify limits the protection given by § 1985(3) solely and unjustifiably on the basis of artificial factors.

This deferential view that nearly all classes should receive § 1985(3) protection has been suggested by several scholars<sup>209</sup> and courts<sup>210</sup> for

the United States." 18 U.S.C. § 241 (1994).

204. *United States v. Guest*, 383 U.S. 745, 753-54 (1966).

205. *Griffin*, 403 U.S. at 102 n.10; see also *Azar v. Conley*, 456 F.2d 1382, 1386 (6th Cir. 1972) (pointing out the *Griffin* Court's reliance on *Monroe v. Pape*, 365 U.S. 167 (1961)).

206. *Griffin*, 403 U.S. at 102 n.10.

207. 321 U.S. 1 (1944).

208. A group should not be considered readily and easily definable unless it can satisfy the minimum class requirements expressed by Justice Scalia in *Bray*, that the group be "something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. . . . [that] the class 'cannot be defined simply as the group of victims of the tortious action.'" *Bray*, 506 U.S. 269 (quoting *Scott*, 463 U.S. at 850 (Blackmun, J., dissenting)).

209. See McDonald, *supra* note 3, at 511.

210. *Azar v. Conley*, 456 F.2d 1382, 1386 n.5 (6th Cir. 1972) (dicta); see also

many reasons. The language of § 1985(3) itself instructs that the conspiracy can be aimed at “any person or class of persons.”<sup>211</sup> These words do not indicate any limitation on what classes qualify for its protection. To impose such a limitation would contradict the Court’s instruction in *Griffin* to “accord [civil rights statutes] a sweep as broad as [their] language.”<sup>212</sup> Furthermore, other Reconstruction civil rights statutes and amendments, which likewise do not mention which classes are protected, such as the Fourteenth Amendment, are no longer held to protect merely their originally intended beneficiaries. Thus, it is unjustifiable to continue to limit § 1985(3)’s classes in such a way.

Allowing almost any class to qualify for § 1985(3) protection would seem to run contrary to the argument advanced in *Scott*, that § 1985(3) was intended to protect only blacks in the Reconstruction South and its protection should not extend beyond racial bias. However, *Scott*’s interpretation of legislative history is unpersuasive as compared to Justice Blackmun’s dissent in that case which read the motivations of the Forty-Second Congress quite differently. The dissent determined that Congress’ true hope in enacting § 1985(3) was to provide some protection for those who were not receiving equal protection from local law enforcement authorities because of their beliefs or associations.<sup>213</sup> Other critics of the *Scott* majority opinion have also noted both that Congress’ concern in enacting § 1985(3) was not solely racial<sup>214</sup> and that the scant historical analysis contained in the opinion hardly justifies making such a broad assertion.<sup>215</sup> Hence, the class-based animus should not be limited to race solely premised on *Scott*’s interpretation of the Reconstruction.

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*Scott*, 463 U.S. at 853 (Blackmun, J., dissenting).

211. See the language of § 1985(3), *supra* note 4.

212. *Griffin*, 403 U.S. at 97 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

213. *Scott*, 463 U.S. at 853 (Blackmun, J., dissenting). Justice Blackmun argued that:

Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities. While certain class traits, such as race, religion, sex, and national origin, per se meet this requirement, other traits also may implicate the functional concerns in particular situations.

*Id.*

214. See Shatz, *supra* note 58, at 929-31 (arguing that the Ku Klux Klan Act, if it had any primary intended beneficiary, was meant to protect Republicans in the Reconstruction South); McDonald, *supra* note 3, at 475-92.

215. Shatz, *supra* note 58, at 924.



The legislative history of the Ku Klux Klan Act further supports the supposition that all classes were intended to be protected from discriminatory conspiracies. During debate on § 1985(3), one senator who proclaimed that a conspiracy would be actionable if "it should appear that [the] conspiracy was formed against [a] man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . ."<sup>216</sup> Representative Buckley asserted that § 1985(3) "is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children . . ."<sup>217</sup> Representative Harris pointed out that "[t]here is one good feature in this bill; that is, it applies to all."<sup>218</sup> Their comments support the view that the original drafters of § 1985(3) did not conceive of our present situation in which some classes are receiving protection under § 1985(3) and others are not.

### *3. Class-Based Animus Still a Limit on § 1985(3) Actions*

Determining class-based, invidiously discriminatory animus in this proposed way would still achieve the main goal of limiting § 1985(3) claims, namely to maintain the balance of federalism. The strict application of the initial determination of invidious discrimination alone can adequately restrain the number of § 1985(3) claims. For example, the application of this discrimination analysis to the limited facts known of the *Lake* case could have led to the dismissal of the § 1985(3) claim. There, the actions of Elizabeth Lake's parents and the other defendants, although reprehensible in many ways, may have stemmed from a concern for her health and welfare. Their actions would have to be developed more fully to make an accurate determination, but they hardly seem akin to racism. As Justice Scalia might say, the actions of Elizabeth Lake's parents are simply "not the stuff out of which a § 1985(3) 'invidiously discriminatory animus' is created."<sup>219</sup> The limiting effect of the discrimination element alone is evident.

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216. CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (statement of Sen. Edmunds).

217. CONG. GLOBE, 42d Cong., 1st Sess. App. 190 (1871) (statement of Rep. Buckley).

218. CONG. GLOBE, 42d Cong., 1st Sess. 484 (1871) (statement of Rep. Harris).

219. *Bray*, 506 U.S. at 274.

## III. RIGHTS PROTECTED BY § 1985(3)

Section 1985(3) prohibits “depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws.”<sup>220</sup> Yet, this language is not elucidating. The question remains: what “equal protections” are covered by § 1985(3)?

It is important to acknowledge that this analysis presumes that § 1985(3) does not create independent civil rights, but rather is remedial in nature, defending those civil rights, privileges, and immunities granted elsewhere.

The view of the purely remedial nature of § 1985(3) was first recognized by the Supreme Court in *Novotny*<sup>221</sup> and was reaffirmed in *Scott*.<sup>222</sup> The remedial nature of § 1985(3) has been criticized by some scholars.<sup>223</sup> However, such criticism is unpersuasive. Admittedly, the Forty-Second Congress created a new cause of action by enacting § 1985(3), but this legislation was designed to be corrective and protective of the other new rights created by the Reconstruction-era Congresses.<sup>224</sup> This remedial nature is most clearly evidenced by the name given to the Ku Klux Klan Act when first introduced to the House; it declared to be a bill “to enforce the provisions of the Fourteenth Amendment to the Constitution and for other purposes.”<sup>225</sup> Hence, § 1985(3) is rightly understood as a purely remedial statute.

*A. The Rights are Vindicated by § 1985(3)*

Since § 1985(3) does vindicate “rights found elsewhere,” as shown above, the remaining issue is which rights. This issue was answered in

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220. 42 U.S.C. § 1985(3) (1994). See *supra* note 4 and accompanying text.

221. See *Great American Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 372 (1979) (“Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights its designates.”).

222. See *Scott*, 463 U.S. at 833 (quoting *Great American Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 372 (1979)).

223. See Helyn S. Goldstein, Note, *Private Conspiracies to Violate Civil Rights: The Scope of Section 1985(3) After Great American Federal Savings & Loan Association v. Novotny*, 61 B.U. L. REV. 1007, 1019-1021 (1981) (arguing that § 1985(3) has a hybrid, remedial and substantial nature). It should be noted that this Note was written prior to the decision in *Scott*.

224. See Gressman, *supra* note 3, at 1334.

225. *Id.*

the *Scott* decision<sup>226</sup> and was reaffirmed in *Bray*.<sup>227</sup>

The extent of the rights actionable under § 1985(3) seems to depend on whether the conspirators may be considered state actors in some sense. This dependence stems from the distinction between those rights secured against governmental interference and those rights which are also protected against private interference.<sup>228</sup> If, among the conspirators, some person or organization could be deemed a state agent or if state action can be found, then the whole gambit of constitutional rights may be vindicated by § 1985(3).<sup>229</sup> However, if the conspiracy is solely private, then § 1985(3) vindicates only those rights "protected against private, as well as official, encroachment."<sup>230</sup>

A list of those rights guaranteed against private impairment is admittedly brief.<sup>231</sup> In *Bray*, Justice Scalia listed the Thirteenth Amendment right to be free from involuntary servitude<sup>232</sup> and the right to interstate travel.<sup>233</sup> However, this list could also include the right to vote,<sup>234</sup> the

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226. See *Scott*, 463 U.S. at 833.

227. See *Bray*, 506 U.S. at 274.

228. Compare, for example, U.S. CONST. AMEND. I, XIV with U.S. CONST. AMEND XIII.

229. See *United States v. Price*, 383 U.S. 787 (1966). In *Price*, the Supreme Court construed the criminal counterpart of § 1985(3), 18 U.S.C. § 241, which does not explicitly require any state action for a conspiracy depriving rights for a felony violation. *Id.* at 801. Since § 241 conspiracies could be completely private, the Court had previously held that the statute did not extend to protect Fourteenth Amendment rights, which protect solely against governmental action. *Id.* at 796-97. But, in *Price*, state actors were active participants in the conspiracy in question. *Id.* at 799. Thus, the protections of § 241 were extended, where there was state involvement, to include those rights which secure against governmental action as well. *Id.* The state involvement brought "the conspiracy within the ambit of the Fourteenth Amendment." *Id.* In the same way, if one of the § 1985(3) conspirators could be deemed a state actor, then the conspiracy as a whole could also deprive another of their rights which are guaranteed against governmental infringement as well.

230. *Scott*, 463 U.S. at 833; see also *Bray*, 506 U.S. at 274.

231. See *United States v. Guest*, 383 U.S. 745, 771 (1966) (Harlan, J., dissenting). "It is true that there is a very narrow range of rights against individuals which have been read into the Constitution." *Id.*; see also *Twining v. New Jersey*, 211 U.S. 78 (1908).

232. *Bray*, 506 U.S. at 278 (citing *United States v. Kozminski*, 487 U.S. 931, 942 (1988)).

233. See *id.* at 278 (citing *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966)).

right not to be injured while in the custody of a United States Marshall,<sup>235</sup> the right to inform federal officials of violations of federal law,<sup>236</sup> and the right to assemble to petition the Congress for a redress of grievances.<sup>237</sup>

This limited number of rights protected from infringement by a private conspiracy under § 1985(3) has received much criticism. The main thrust of this argument has been that such a limited protection of rights under § 1985(3) goes against congressional intent.<sup>238</sup> The basic contention is that the drafters of § 1985(3) believed that the protection offered by the statute would reach private conspiracies to deprive civil rights regardless of whether those rights were secured against private or governmental infringement.<sup>239</sup> The belief of the 1871 drafters depended on the theory that "the right of equal protection of the law as well as other rights were rights of national citizenship guaranteed directly to the people. They existed independently of any state action."<sup>240</sup>

However, this argument is flawed. The drafters who crafted the Ku Klux Klan Act in 1871 viewed their constitutional powers in a manner which is presently not acceptable. As Justice Blackmun's comments above illustrate, the Congresses of the Reconstruction era viewed their powers under the newly enacted Thirteenth, Fourteenth, and Fifteenth Amendments as broad, expansive powers. In their opinion, the federal government's new powers encompassed areas which the Southern states were neglecting. One area of particular neglect was securing civil rights for individuals.<sup>241</sup> It is particularly telling that § 1985(3) was enacted in 1871, five years before the Supreme Court, in *United States v. Cruikshank*<sup>242</sup> held that the Civil War amendments applied only to the states and not to private misconduct.<sup>243</sup> The 1871 Congress' federally dominated view of federalism, however, has not withstood the scrutiny of the

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234. See *Ex parte Yarbrough*, 110 U.S. 651 (1884); see also *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *id.* at 554 (listing various other private rights associated with voting).

235. See *Logan v. United States*, 114 U.S. 263 (1892).

236. See *In re Quarles*, 158 U.S. 532, 537-38 (1895).

237. See also *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (dicta).

238. See Gormley, *supra* note 3, at 540.

239. See *Scott*, 463 U.S. at 846 (Blackmun, J., dissenting).

240. *Id.* at 843 (Blackmun, J., dissenting).

241. See Gressman, *supra* note 3, at 1329-36.

242. 92 U.S. 542 (1876).

243. *Id.* at 554-55.

Supreme Court. The Court, during and after the Reconstruction, consistently held that the states are primarily responsible for ensuring the rights of their citizens.<sup>244</sup> Admittedly, the creators of § 1985(3) likely hoped that the statute would extend protection beyond the narrow scope it is given today, but this hope resulted from their misconception regarding the actual extent of their powers. To presently give § 1985(3) the scope its drafters thought it had, simply because they thought so, would require a massive break from precedent and reformulation of the balance of federalism.

### *B. Rights Vindicated in Lake*

In *Lake*, Elizabeth Lake alleged that the defendants' conspiracy deprived her of the "fundamental right to procreation" and as such she should be able to recover under 42 U.S.C. § 1985(3).<sup>245</sup> The source of this fundamental right is never elaborated upon and the court cites no legal precedent to justify the existence of such a right. The only explanation comes in a footnote, which specifies that the procreative right comes from the Constitution, not the Americans with Disabilities Act.<sup>246</sup> One is left to assume that this right to procreation is derived from an implied constitutional right of privacy.<sup>247</sup> If this assumption is correct, then this procreative right should be analyzed much like the right to abortion in *Bray*.<sup>248</sup> There, Justice Scalia clearly held that the right to an abortion, and the more general right to privacy, are not among the rights secured against private infringement, and thus not protected under § 1985(3). Hence, the Third Circuit erred in allowing this right to pro-

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244. See Gormley, *supra* note 3, at 541-46. See generally, Gressman, *supra* note 3, at 1337-43.

The legislative program of the post-Civil War days was premised on the belief that the fundamental rights of the individual should be defined and enforced by the federal government. But the Supreme Court has consistently refused to accept that premise. It has substituted its belief that civil rights lie within the realm of state power and that any federal attempt to encroach on that power is to be viewed narrowly and suspiciously. The Court has expressed its belief so many times that it would necessitate a judicial and constitutional upheaval of the first magnitude to undo what the Court has done.

Gressman, *supra* note 3, at 1357.

245. See *Lake*, 112 F.3d at 685.

246. *Id.* at 688 n.10.

247. See generally *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

248. See *Bray*, 506 U.S. at 276.

creation to be protected under § 1985(3).

However, before this assessment of error is made final, another possibility should be considered. The court explicitly declined to rule on whether Tyrone Hospital could be deemed a state actor for the purposes of § 1985(3).<sup>249</sup> As seen above, if the conspiracy does not solely consist of private actors, but has some state actors, then § 1985(3) can vindicate rights guaranteed against public as well as private infringement.<sup>250</sup> Therefore, the plaintiffs in *Lake* could properly recover under § 1985(3) if Tyrone Hospital were later found through more extensive fact finding to be a state actor.

### C. An Apology for the Narrow Scope

A natural reaction to limiting the coverage of a civil rights statute is a feeling of anxiety. Will such a narrow scope leave some groups defenseless? By curbing the stretch of the statute, are we allowing discrimination to run rampant? These worries are inappropriate in reference to the analysis of § 1985(3) proposed in this Note.

Section 1985(3) actions reach solely the narrow group of rights secured against private infringement only in those situations where no state action can be found in the conspiracy.<sup>251</sup> However, with the state action doctrine interpreted broadly,<sup>252</sup> this would rarely be the case. In most cases, state action will be present. Thus, in most instances, the whole gambit of constitutional rights will be available for vindication under § 1985(3).

Furthermore, § 1985(3) actions will rarely be a plaintiff's only option for redress. In the *Lake* decision, Elizabeth Lake brought several claims against the defendants, including a claim under § 1983, as well as several state claims.<sup>253</sup> This is typical of the other cases discussed above. Hence, a narrow reading is not troubling because one of the many weap-

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249. See *Lake*, 112 F.2d at 689.

250. See *Scott*, 463 U.S. at 833.

251. See *id.*

252. See Martin Dolan, Comment, *State Inaction and Section 1985(3): United Brotherhood of Carpenters & Joiners of America v. Scott*, 71 IOWA L. REV. 1271, 1280 (1986) (interpreting *Shelly v. Kraemer*, 334 U.S. 1 (1948), to "represent the possibility that virtually all societal activities could be regarded as state action."); *Guest*, 383 U.S. at 755 ("In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral.").

253. See *Lake*, 112 F.2d at 684.

ons in the arsenal of legal devices against discrimination has a smaller bang than the others.

The narrow scope of rights vindicated under § 1985(3) should be appreciated as another means to prevent the use of the statute as a general federal tort law. As discussed in the *Griffin* decision and above, there would be serious constitutional problems with federalizing what would otherwise be state tort actions.<sup>254</sup> Thus, the limited scope of rights protected under § 1985(3) has the kinder, gentler benefit of maintaining the traditional balance of state and federal powers.

#### IV. CONCLUSION

The issue of whether disabled individuals can recover under § 1985(3) has almost become lost in the discussion of the statute's coverage and scope. Clearing away some of the confusion surrounding the Ku Klux Klan Act is necessary for a precise, accurate view of § 1985(3). The confusion was caused by three sources: (1) the lack of Supreme Court guidance; (2) the mistaken shift of focus from the defendant's intent to the plaintiff's class membership; and, (3) the mistaken views of the Reconstruction Congress. By brushing aside this confusion and by recognizing the misleading influences at work in *Lake*, it becomes clear that disabled individuals and all other readily definable classes can recover under § 1985(3) for private conspiracies to deprive them of those rights guaranteed against private infringement.

*Matthew C. Hans*

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254. See *supra* note 167, and accompanying text.